Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1370 OF 2009
LOW HOP BING, MOHD HISHAMUDIN AND ZAHARAH IBRAHIM JJCA
7 OCTOBER 2010

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Civil Procedure — Appeal — Facts, finding of — Interference by appellate court — Circumstances where appellate court will intervene — Whether present case warranted appellate intervention — Whether probability of evidence supported trial judge's finding

D

Contract — Agreement — Formation — Oral agreement — Whether there was sufficient evidence of oral agreement between parties

E

Evidence — Proof of — Admissibility — Failure to produce documents or receipts of payments — Whether failure rendered plaintiffs' evidence doubtful or illusory — Whether probability of evidence supported trial judge's finding that there was oral agreement between parties

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Sang Lee Co Sdn Bhd ('the defendant'), a company, was the owner of a rubber estate ('the estate') measuring 480 acres in area. Subramaniam a/l Mayawan and the three others ('the plaintiffs') were partners in a partnership firm. According to the plaintiffs their relationship with the defendant company dated to as far back as 1995 when one Tan Tuan Kim ('Tan') of the defendant company had agreed to allow the plaintiffs to carry out rubber tapping and latex collection on the estate after the first plaintiff agreed to pay a sum of RM10,000 per month to the defendant. Later as the rubber trees grown in the estate were old, the defendant company had decided to fell them and to plant in their place oil palm trees. The defendant had then allegedly entered into an oral contract with the plaintiff firm to plant oil palm trees on the estate and to undertake such further services as weeding, manuring and maintenance of the trees for a period of ten years. In return for carrying out these services, the plaintiffs were allegedly given the right to harvest the oil palm fruit from the estate for a period of ten years. The plaintiffs allegedly accepted these terms but asked that the oral agreement be put in writing. The plaintiffs alleged that when the defendant failed to follow up with a proper written agreement and acted in breach of its oral contract with the plaintiffs, the latter had stopped all oil palm replanting work and sought to recover by way of a writ action the reimbursement of expenses incurred in carrying out works in the estate as a

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result of the oral agreement between the plaintiff firm and the defendant. It was the plaintiffs' claim that besides replanting works they had they had also constructed 29 culverts on the estate to improve the drainage system. The defendant denied the existence of any contract with the plaintiffs and tendered various vouchers to support its claim that the works done on the estate were carried out by other contractors and not the plaintiffs. The trial judge, who found the plaintiffs' version to be more probable, held that there was an oral contract between the plaintiffs and the defendant company and a breach of the contract. He therefore allowed their collective claim as a partnership against the defendant company. This was the defendant's appeal against that decision.

Held, allowing the appeal with costs:

(1) (per **Low Hop Bing** and **Zaharah Ibrahim JJCA**) The plaintiffs' evidence of making payments of RM10,000 per month to Tan of the defendant company was not supported by a single document or receipt. This made the plaintiffs' evidence either doubtful or illusory. The defendant on the other hand had adduced evidence to show that there were other contractors doing oil palm replanting work on the estate during the same period when the plaintiffs were making their claim. The evidence adduced by the plaintiffs had to be tested against the contemporaneous documentary evidence adduced by the defendant (see paras 14–16).

(2) (per **Low Hop Bing** and **Zaharah Ibrahim JJCA**) It was abundantly clear that there had been insufficient appreciation by the trial judge of the evidence before him. The trial judge had erred in his finding that there was an oral agreement between the plaintiffs and the defendant when the probability of the evidence did not support such a finding. The trial judge's insufficient appreciation of the evidence before him would warrant appellate intervention (see paras 17–24, 27).

(3) (per **Mohd Hishamudin JCA**, dissenting) Having examined the entire evidence of the parties, it was clear that the High Court judge was correct in his ruling that there was an oral contract formed between the plaintiff firm (through the first plaintiff) and the defendant company (through Tan). The trial judge, who had the opportunity of observing the demeanour of the witnesses, found the first plaintiff to be a credible witness, and he gave his reasons for his findings. These findings should not be disturbed as they neither go against the weight of evidence nor are in any way perverse. Further the first plaintiff's evidence was well corroborated. The documentary evidence, tendered by the first plaintiff at the trial also lent credence to his evidence that he had expended money to buy those things that he had claimed to have purchased for the purpose of carrying out the works under the oral contract (see paras 55–57).

(4) (per **Mohd Hishamudin JCA**, dissenting) The evidence of Tan, a director of the defendant at the material time, was crucial to the defendant's case but for reasons best known to the defendant, Tan was not called to testify. As such, the trial Judge was correct in invoking the presumption under s 114(g) of the Evidence Act 1950 by reason of the failure of the defendant to call Tan to give evidence. This failure on the part of the defendant to call Tan was tantamount to the withholding of evidence (see para 58).

(5) (per **Mohd Hishamudin JCA**, dissenting) The trial judge was also correct in his view that, considering the position of Tan in the defendant company (a director) and the role he played in the management of the estate, the oral contract that Tan made with the plaintiffs would bind the defendant company. In the present case the rule in *Turquand*'s case protected all outsiders dealing with a company in good faith, such as the first plaintiff (see para 63).

(6) (per **Mohd Hishamudin JCA**, dissenting) The terms of the oral agreement between the first plaintiff and Tan, were quite clear and capable of constituting a valid contract under the Contracts Act 1950. Thus the defendant's argument that the terms were vague and therefore incapable of constituting a valid contract could not stand (see para 69–70).

[Bahasa Malaysia summary

Sang Lee Co Sdn Bhd ('defendant'), sebuah syarikat, adalah pemilik estet getah ('estate') berukuran 480 ekar luas. Subramaniam a/l Mayawan dan tiga lain ('plaintif-plaintif') adalah rakan kongsi dalam firma perkongsian. Menurut plaintif-plaintif hubungan mereka dengan defendan syarikat bermula sejak tahun 1995 apabila Tan Tuan Kim ('Tan') daripada defendant syarikat bersetuju untuk membenarkan plaintif-plaintif menjalankan penorehan getah dan pengumpulan lateks di estet tersebut selepas plaintif pertama bersetuju membayar sejumlah RM10,000 setiap bulan kepada defendan. Kemudian apabila pokok-pokok getah yang tumbuh dalam estet tersebut telah tua, defendan syarikat telah memutuskan untuk menebang pokok-pokok getah tersebut dan sebagai ganti menanam pokok kelapa sawit. Defendan kemudian dikatakan memasuki kontrak secara lisan dengan firma plaintif untuk menanam pokok-pokok kelapa sawit di estet tersebut dan untuk mengendalikan perkhidmatan selanjutnya seperti membuang rumpai, membubuh baja dan menyelenggara pokok-pokok tersebut untuk tempoh sepuluh tahun. Sebagai balasan menjalankan perkhidmatan tersebut, plaintif-plaintif dikatakan telah memberikan hak untuk mengambil hasil buah kelapa sawit daripada estet tersebut untuk tempoh sepuluh tahun. Plaintif-plaintif dikatakan telah menerima syarat-syarat tersebut tetapi meminta agar perjanjian lisan itu dibuat secara bertulis. Plaintif-plaintif mengatakan bahawa apabila defendan gagal membuat perjanjian bertulis yang

A sewajarnya dan bertindak melanggar kontrak lisannya dengan plaintif-plaintif, plaintif-plaintif telah memberhentikan semua kerja penanaman semula kelapa sawit dan memohon untuk mendapat balik melalui tindakan writ pembayaran balik untuk perbelanjaan yang ditanggung dalam menjalankan kerja-kerja di estet tersebut akibat daripada perjanjian lisan antara firma plaintif dan B defendan. Ini adalah tuntutan plaintif bahawa selain daripada kerja-kerja penanaman semula mereka juga telah membina 29 pembetung atas estet tersebut untuk memperbaiki sistem perparitan. Defendan menafikan kewujudan apa-apa kontrak dengan plaintif-plaintif dan mengemukakan pelbagai baucar untuk menyokong tuntutannya bahawa kerja-kerja yang C dilakukan di estet tersebut telah dilakukan oleh kontraktor-kontraktor lain dan bukan plaintif-plaintif. Hakim perbicaraan, yang mendapati versi plaintif lebih berkemungkinan, memutuskan bahawa terdapat kontrak lisan antara plaintif-plaintif dan defendan syarikat dan pelanggaran kontrak. Oleh itu beliau membenarkan tuntutan kolektif mereka sebagai perkongsian terhadap D defendan syarikat. Ini adalah rayuan defendan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Low Hop Bing** dan **Zaharah Ibrahim JJCA**) Keterangan E plaintif-plaintif membuat bayaran-bayaran RM10,000 sebulan kepada Tan daripada syarikat defendan tidak disokong oleh satu dokumen atau resit pun. Ini membuatkan keterangan plaintif-plaintif sama ada meragukan atau mengabui. Defendan sebaliknya telah mengemukakan keterangan untuk menunjukkan bahawa terdapat kontraktor-kontraktor F lain yang menjalankan kerja penanaman semula di estet tersebut semasa tempoh yang sama apabila plaintif-plaintif membuat tuntutan mereka. Keterangan yang dikemukakan oleh plaintif-plaintif mesti diujikan terhadap keterangan dokumentar pada masa yang sama yang dikemukakan oleh defendan (lihat perenggan 14–16).

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(2) (oleh **Low Hop Bing** dan **Zaharah Ibrahim JJCA**) Ia adalah amat jelas bahawa tidak terdapat penelitian yang wajar oleh hakim bicara terhadap keterangan di hadapannya. Hakim bicara telah tersilap dalam dapatannya bahawa terdapat perjanjian lisan di antara plaintif-plaintif dan defendan apabila kebarangkalian keterangan tidak menyokong H dapatan sedemikian. Penelitian keterangan yang tidak mencukupi oleh hakim bicara terhadap keterangan di hadapannya akan mewajarkan campur tangan mahkamah rayuan (lihat perenggan 17–24, 27).

(3) (oleh **Mohd Hishamudin HMR**, menentang) Setelah mengkaji I keseluruhan keterangan pihak-pihak, adalah jelas bahawa hakim Mahkamah Tinggi betul dalam keputusannya bahawa terdapat kontrak lisan antara firma plaintif (melalui plaintif pertama) dan defendan syarikat (melalui Tan). Hakim perbicaraan, yang mendapat peluang meneliti sikap saksi-saksi, mendapati plaintif pertama adalah saksi yang

boleh dipercayai, dan beliau telah memberikan alasan untuk penemuan beliau. Penemuan-penemuan tersebut tidak patut diganggu kerana tidak menjejaskan beban keterangan mahupun dalam apa cara bertentangan. Bahkan keterangan plaintif pertama disokong baik. Keterangan dokumentar yang dikemukakan oleh plaintif pertama semasa perbicaraan juga mengukuhkan keterangannya bahawa dia telah menanggung perbelanjaan untuk membayar barangan yang didakwa telah dibelinya bagi tujuan melakukan kerja-kerja di bawah kontrak lisan itu (lihat perenggan 55–57).

(4) (oleh **Mohd Hishamudin HMR**, menentang) Keterangan Tan, pengarah defendan pada masa matan, adalah penting terhadap kes defendan namun atas sebab yang lebih diketahui oleh defendan, Tan tidak dipanggil untuk memberi keterangan. Oleh itu, hakim perbicaraan betul untuk menggunakan anggapan di bawah s 114(g) Akta Keterangan 1950 atas alasan kegagalan defendan memanggil Tan memberikan keterangan. Kegagalan di pihak defendan untuk memanggil Tan sama seperti menahan keterangan (lihat perenggan 58).

(5) (oleh **Mohd Hishamudin HMR**, menentang) Hakim perbicaraan juga betul dengan pandangan beliau bahawa, mengambilkira kedudukan Tan dalam defendan syarikat (seorang pengarah) dan peranannya dalam pengurusan estet tersebut, kontrak lisan yang dibuat oleh Tan dengan plaintif-plaintif mengikat defendan syarikat. Dalam kes ini rukun kes *Turquand* melindungi semua urusan orang luar dengan syarikat secara niat baik, sepertimana plaintif pertama (lihat perenggan 63).

(6) (oleh **Mohd Hishamudin HMR**, menentang) Syarat perjanjian lisan antara plaintif pertama dan Tan adalah jelas dan boleh membentuk kontrak sah di bawah Akta Kontrak 1950. Oleh itu hujah defendan bahawa syarat-syarat tersebut tidak jelas dan tidak boleh membentuk kontrak sah tidak dapat kekal (lihat perenggan 69–70).]

Notes

For a case on admissibility, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2508.

For cases on agreement in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2466–2492.

For cases on fact, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 999–1117.

Cases referred to

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35; [1988] 1 CLJ 50 (Rep), SC (refd)

Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309, FC (refd)

A *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ 155 (Rep), SC (refd)
Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang & Ors [2009] 8 MLJ 818, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97;
B [2003] 2 AMR 257, CA (refd)
MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor [2005] 5 MLJ 303, HC (refd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)
C *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* [2006] 3 MLJ 249, HC (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673; [1995] 4 CLJ 670, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Tay Tong Chew & Anor v Abu Rahman bin Hj Ahmad [1985] 1 MLJ 50; [1984]
D 1 CLJ 389 (Rep), FC (refd)

Legislation referred to

Contracts Act 1950 s 30
Evidence Act 1950 ss 101(1), (2), 114(g)

E

Appeal from: Civil Suit S4–22–24–305 of 2004 (High Court, Kuala Lumpur)

Chan By Sing (Lim Cheng Wun and Sakthy Vell with him) (Prasad Abraham & Associates) for the appellant.
MJ Ganesan (J Ganesan Tajul Anuar & Co) for the respondent.

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Low Hop Bing JCA (delivering majority judgment):

APPEAL

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[1] This appeal by the appellant ('the defendant') is lodged against the decision of the Kuala Lumpur High Court in allowing the claim of the respondent ('the plaintiff') after a full trial.

H **[2]** We heard the appeal on 31 May and 1 June 2010. By a majority judgment (Low Hop Bing and Zaharah bt Ibrahim JJCA concurring and Mohd Hishamudin bin Mohd Yunus JCA dissenting), we allowed the appeal. We now give the grounds of the majority judgment.

I THE PLAINTIFFS' CLAIM

[3] The plaintiffs are partners who have been carrying on the business of supplying tanker lorry services to carry latex from Kota in Negeri Sembilan to Port Klang in Selangor since 1987.

[4] The plaintiffs' claim against the defendant is based on an oral contract in March 1999 with the defendant to replant, maintain and fertilise oil palm seedlings on 240 acres ('*kawasan A*') which was half the area of estate No 6 belonging to the defendant; and the plaintiffs were promised the right to harvest oil palm fruits on the 480 acres in the entire estate No 6 for 10 years. Since there was no written contract, the plaintiffs stopped all works in October 2000 and sought to recover sums of money that they had purportedly spent in relation to *kawasan A*, due to the defendant's breach of contract.

THE DEFENCE

[5] The defendant, the owner of estate No 6 measuring 480 acres in area, denied the existence of any contract with the plaintiffs, and averred that it had actually engaged other contractors viz Mr Ng Boon Geok and Mr Tan Leng Seong ('Ah Seng') to do all oil palm seedlings replanting and field works such as spraying, road works, drainage, harvesting, pruning and manuring on the entire 480 acres of estate No 6.

ANY CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANT?

[6] It was submitted by the defendant's learned counsel Mr Chan By Sing (Ms Lim Cheng Wun and Mr Sakthy Vell with him) that there was no contract between the plaintiffs and the defendant in relation to the replanting works carried out in *kawasan A* of estate No 6.

[7] The plaintiff's learned counsel Mr MJ Ganesan supported the learned trial judge's finding that there was an oral contract for the replanting works in *kawasan A* to bind the parties.

[8] The learned trial judge traced the plaintiffs' case to 1995 when one Tan Tuan Kim of the defendant company was said to have approached Mr Subramaniam ('PW1') of the plaintiffs' firm and offered him (PW1) to do rubber tapping and latex collection in estate No 6 owned by the defendant. In return, PW1 agreed and paid a sum of RM10,000 per month to Tan Tuan Kim. There was no written agreement for rubber tapping and latex collection. The relationship was said to have continued until March 1999 when the said Tan Tuan Kim offered PW1 oil palm replanting works for 240 acres in estate No 6. In return, the plaintiffs were given the right to harvest the oil palm fruits from estate No 6 for a period of ten years; and the assurance and promise that a proper written agreement would follow suit. In the meantime, besides replanting works, earthworks, ground levelling and construction of roads and culverts in Kawasan A were undertaken by the plaintiffs. The plaintiffs kept on pestering Tan Tuan Kim for the written agreement and made various trips to

the defendant's office in Kuala Lumpur, but was unable to meet anybody. All along, Tan Tuan Kim and his brother Ah Seng were in the estate, supervising the plaintiffs' works. Soon, when the plaintiffs realised that Tan Tuan Kim has ceased coming to the estate, the plaintiffs stopped work in October 2000. One Cheong Pang Kwan ('DW1'), another director of the defendant company, used to come for fishing trips in the estate and was aware that the plaintiffs were doing work there. In carrying out the earthworks, the construction of roads and culverts and digging holes for the purpose of replanting oil palm seedlings in *kawasan A*, the plaintiffs employed a subcontractor and other workers.

[9] On the other hand, against the plaintiff's case, the learned trial judge referred to the defendant's rebuttal evidence adduced through DW1, the executive director of the defendant company. DW1 confirmed that the defendant has a contract with one Lim Beng for latex collection up to 1994. In 1995, the defendant started embarking on replanting works in the entire estate No 6 including *kawasan A* and appointed Ng Boon Geok and Tan Leng Seong as the main contractors to undertake the job. DW2, who corroborated DW1's evidence, testified that the culverts in estate No 6 were constructed by another contractor Goh Lai Pen and that Tan Tuan Kim was appointed as the manager for estate No 6. Tan Tuan Kim would issue requisitions for works done in estate No 6 for which payments were made by the defendant company. Various vouchers were tendered by DW2 to support the defendant's claim that the works done in estate No 6 were carried out by other contractors and not the plaintiffs.

[10] On the aforesaid evidence adduced for the plaintiffs and the defendant respectively, the learned trial judge found the plaintiffs' version to be more probable and allowed their claim against the defendant.

[11] Having regard to the submissions of learned counsel and, subsequently, the decision of the learned trial judge, we identified the issue for determination in the instant appeal as follows:

> On the evidence adduced at the trial, was there a legally binding contract between the plaintiffs and the defendant for the replanting of oil palm seedlings and other related works in Kawasan A of Estate No 6?

[12] This is a question of mixed fact and law.

[13] The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant. Sections 101(1) and (2) of the Evidence Act 1950 merit reproduction as follows:

101 Burden of proof —

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(see eg *MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor* [2005] 5 MLJ 303; *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673; [1995] 4 CLJ 670, *Nuri Asia Sdn Bhd v Fosis Corp Sdn Bhd & Anor* [2006] 3 MLJ 249 at p 254 and *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang & Ors* [2009] 8 MLJ 818 at pp 827 and 828 (HC)).

[14] The learned trial judge had relied heavily on the alleged oral contract for rubber tapping and latex collection in support of an oral contract for replanting oil palm seedlings and related works. In relation to the oral contract for rubber tapping and latex collection, it is necessary for us to stress that the plaintiffs' evidence of the so-called payments of RM10,000 per month to Tan Tuan Kim, apparently for a period of four to five years ie from 1995–1999 was not supported by a single document or receipt. The plaintiffs also did not call Tan Tuan Kim as their witness. If the payments had in fact been made, then the total amount paid for the period of four to five years ie 48–60 months would have escalated to RM480,000 at the lowest, and RM600,000 at the highest. Surely, payments of such considerable sums, if true, would have been evidenced by receipts issued by Tan Tuan Kim. As there was not a single document or receipt to support such payments, purportedly made by the plaintiffs to Tan Tuan Kim, we are of the view that the probability of the plaintiffs' evidence is either doubtful or illusory.

[15] The evidence adduced for the plaintiffs must be further tested against the contemporaneous documentary evidence adduced for the defendant in the High Court: *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 AMR 257 (CA). Quite apart from that, the defendant had actually appointed one Lim Beng under a written agreement for latex collection (see exh D13 at Tab 16 of the core bundle; and p 96 of the appeal record and confirmed under cross-examination at pp 60–61 of the appeal record). (A reference hereinafter to a page is a reference to that page in the appeal record, unless otherwise stated). Given this situation, we would also adopt the approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case: See also *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* [2006] 3 MLJ 249 (HC) and *Koh Jui Hiong @ Koa Jui Heong & Ors* at p 836.

[16] Next, at p 13, the learned trial judge had referred to the evidence adduced through DW1 for the defendant that there were indeed other contractors in estate No 6 doing oil palm replanting works, purchase of seedlings, manuring, etc from Jan 1999 till November 2001 which also included the period from March 1999 to October 2000, for which the plaintiffs were making their claim.

[17] The first plaintiff, Subramaniam (PW1), in his evidence at pp 50 and 51, has categorically agreed that there was no contract between the plaintiffs and the defendant. The relevant portion of the cross-examination of PW1 merits reproduction as follows:

> Question: I put it to you, Mr Subramaniam, a general maintenance of the estate was done by Sang Lee's own contractors and not by you. Agree?
>
> Answer: I agree [p 50]
>
> Question: I put it to you since there was no agreement between Sang Lee and you for the phase 2 replanting of oil palm, the issue of deployment of labour by you does not concern Sang Lee. You agree?
>
> Answer: I agree [p 51]

[18] Further cross-examination of the first plaintiff (PW1) also led to his admission that he in fact did not have any contractual arrangement with the defendant (Sang Lee) and that he was actually instructed by other contractors to do works in estate No 6. Page 53 contains the following questions and answers:

> Question: I put it to you that you didn't have any contractual arrangement with Sang Lee.
>
> Answer: I don't have any agreement with them
>
> Question: I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. Do you agree?
>
> Answer: Agree

[19] At p 55, PW1 also admitted that he did indeed take instructions from Tan Leng Seong (Ah Seng) and that Ah Seng was the contractor who supervised the whole of the defendant's estate. This evidence corroborates the testimony of DW1 and DW2 that the replanting works in the estate had been contracted to other persons, not the plaintiffs who were at best subcontractors.

[20] PW1 also admitted at p 53 that when he approached DW1 for the first time during the latter's fishing trip, DW1 had told him (PW1) that the defendant had no dealings with the plaintiffs.

[21] The second plaintiff (PW2) had also categorically admitted that Ah Seng was the main contractor, as shown in the following evidence: **A**

> Question: I put it to you, the Mr Ah Seng that you refer to (in) your answer was the main contractor doing work on the estate? **B**
>
> Answer: Yes, I agree [p 44]

[22] In fact, PW2 continued in his evidence that Ah Seng was the one who was taking care of the estate and that Ah Seng was the one whom they have to deal with (p 44). **C**

[23] PW2 had admitted that he had issued three bills dated 15 July 2002 at the behest of Subramaniam (the first plaintiff) who had told him (PW2) to do so, in order to tender in court for the ad hoc purpose of the proceedings in which PW1 had commenced the action against the defendant (question and answer 12 at p 92). **D**

[24] It is abundantly clear to us that there has been insufficient appreciation by the learned trial judge of the evidence, in particular, the evidence reproduced above, which was adduced before him. **E**

[25] In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin (f) & Anor* at 116E–F (MLJ); p 373 (AMR), this court held that: **F**

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves. **G**
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case. **H**

[26] On appeal, in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309 (FC), the Federal Court at p 320 F–g (MLJ); p 793 (AMR) held that the Court of Appeal had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial* **I**

court. The Federal Court also affirmed that the phrase 'insufficient judicial appreciation of evidence' is consistent with the established 'plainly wrong test'.

[27] In line with the principle enunciated by the Federal Court in *Gan Yook Chin*, we found it necessary to examine the process of evaluation of the evidence by the learned trial judge, which we have set out above. The learned trial judge's insufficient appreciation of the evidence adduced before him would warrant appellate intervention which we hereby do.

CONCLUSION

[28] The learned trial judge had erred in his finding that there was an oral agreement between the plaintiffs and the defendant when the probability of the evidence does not support such a finding. By majority, we allowed this appeal, set aside the judgment of the learned trial judge and substituted it with an order that the plaintiffs' claim be dismissed with costs of RM5,000. Deposit to be refunded to the defendant (the appellant).

Mohd Hishamudin JCA (dissenting):

[29] This is an appeal by the appellant (the defendant at the trial before the High Court) against the decision of the learned judge of the High Court of Kuala Lumpur given on 29 June 2009. The learned judge had allowed the respondents' (the plaintiffs at the trial before the High Court) claim against the appellant for breach of an oral contract, and had ordered that damages be assessed.

[30] I am dismissing this appeal with costs.

[31] I shall now give my grounds.

[32] In this judgment, the appellant will be referred to as the 'defendant', and the respondents will collectively be referred to as the 'plaintiff' (the partnership).

[33] The four plaintiffs are partners in a partnership firm known as Syarikat S F. They are bringing this action collectively as a partnership.

[34] The defendant is a company that has a registered office in Petaling Jaya with a business address at Jalan Tun H S Lee, Kuala Lumpur.

[35] The plaintiff's claim against the defendant is for breach of an oral contract made between the partnership, through one of its partners, namely,

the first plaintiff, Suburamaniam a/l Mayawan ('Suburamaniam'), and the defendant company through one of its directors, namely, one Tan Tuan Kim ('Tan'). This oral agreement is alleged to have been made in March 1999 between Suburamaniam and Tan.

[36] The main witness for the plaintiff is Suburamaniam himself. He testified in court as the plaintiff's first witness (PW1). The following facts are established by his evidence.

[37] He was the partner of the plaintiff's firm responsible for the management and operation of the partnership. The business premises of the partnership were located in a small town in Negeri Sembilan — the town of Kota, a town surrounded by rubber and oil palm estates. His firm provided lorry services transporting liquid latex from the rubber producing areas around Kota to places like Port Klang. His firm also managed the latex collection of rubber estates. The firm had two tanker lorries and employed about 10 to 15 regular employees. At times, should the need arise, his firm would employ foreign workers, namely, Indonesian and Indian contract workers in addition to the regular employees.

[38] The plaintiff's business dealings with the defendant company first began in 1995. The defendant company owned a rubber estate near Kota. It was an estate with an area of some 480 acres. The rubber trees grown in the estate were old. The defendant company wanted to fell them and to plant in their place oil palm trees. So, in the early part of 1995, Tan (a director of the defendant company) approached Suburamaniam (a partner of the plaintiff's partnership firm) and inquired as to whether the latter's firm would be interested to tap and collect the latex from the old rubber trees before they are felled in return for a cash payment (to the defendant company) of RM10,000 per month. The latter agreed. So, the plaintiff tapped and collected the latex and the defendant company was paid RM10,000 per month.

[39] Subsequently, in the later part of 1997 the defendant company cut down the old rubber trees to make way for oil palm cultivation. Oil palm seedlings were planted on 240 acres of the estate. But some of the young oil palms planted were destroyed by wild boars.

[40] In March 1999 Tan approached Suburamaniam to ask whether he would be interested to plant oil palms in the remaining half area (that is to say, in the other 240 acres) of the estate, and also in those areas where the oil palms had already been planted by the defendant but were destroyed by wild boars; and also to undertake such further services as weeding, manuring and maintenance of the trees in the entire 480 acres for a period of ten years. In return for carrying out these services, the plaintiff would be given the right to

harvest the fruits of the oil palms for a period of ten years in the entire 480 acres of the estate. After the ten-year period, the plaintiff would have to surrender the trees back to the defendant. Suburamaniam accepted the terms but asked that the oral agreement be put in writing. Tan agreed but Tan asked Suburamaniam to commence work immediately, and that he would in the meantime arranged for the written agreement to be prepared. He assured Suburamaniam that he would definitely prepare the written agreement.

[41] Given this assurance, Suburamaniam began his works immediately in March 1999. He bought 13,000 oil palm seedlings from a company called Applied Agricultural Research Sdn Bhd in Sungai Buloh costing RM26,490.75, and planted them on the 240 acres of the estate as well as in those areas in the other half of the estate where the oil palm trees had been destroyed by wild boars. To plant the oil palm seedlings, he deployed tractors, excavating machines and grader machines. He employed about 10 to 15 workers on a daily basis to carry out the works of planting, maintaining, watering and manuring. He was at the site daily to supervise the workers.

[42] But in carrying out his works, he found driving his vehicles on the estate roads to transport workers, seedlings and fertilizers difficult because of the poor drainage system. The rain caused soil erosions, and there were deep gullies on the roads. It was difficult to maneuver the vehicles. In order to overcome this problem, there had to be a proper drainage system, and so Suburamaniam constructed 29 culverts to improve the drainage system.

[43] However, Tan, contrary to his assurance, did not prepare the written agreement. Whenever Suburamaniam reminded him about the written agreement, he would assure the latter that the defendant company would in due course prepare the written agreement. Tan also assured Suburamaniam that even without the written agreement the defendant would still honour the oral agreement, just as the defendant company had honoured the oral agreement made previously in 1995.

[44] Subsequently, Suburamaniam observed that Tan ceased to come to the estate.

[45] When Suburamaniam saw that the written agreement was not forthcoming, and that Tan was no longer to be seen, he approached the executive director of the defendant company, one Cheong Pang Kwan (DW1), who used to come for fishing at a pond in the estate, to inquire about the written agreement. The pond was nearby Suburamaniam's nursery. But Suburamaniam was met with a rebuff: Cheong did not recognise his works. To Cheong, he or the defendant company had nothing to do with either Suburamaniam or the plaintiff.

[46] Shocked by Cheong's reaction, Suburamaniam went to the defendant's headquarters in Kuala Lumpur to inquire about the written agreement. He tried to speak to the directors or to anyone at the office of the defendant, but was not allowed to see anyone there. He only managed to speak to the front office clerk. Undeterred, he made subsequent trips to the defendant's office but each time his effort was fruitless.

[47] By reason of the attitude of the defendant, Suburamaniam stopped all works at the end of October 2000.

[48] On 25 November 2002 the plaintiff's solicitors issued a letter of demand to the defendant.

[49] In this writ action, the plaintiff is claiming against the defendant for the reimbursement of expenses incurred in carrying out works in the estate as a result of the oral agreement between Suburamaniam and the defendant.

[50] The judgment of the learned High Court judge at this stage is only on the issue of liability: was there an oral contract between the plaintiff and the defendant; and, if there is, was there a breach of that oral contract?

[51] The learned judge ruled that there was an oral contract between the plaintiff and the defendant and that there was a breach of that oral contract. But the trust of the judgment was more — and I think, rightly so — on the issue as to whether there was indeed an oral contract formed. For, if indeed an oral contract does exist, clearly, the defendant, by its conduct, has no intention of honouring the oral agreement.

[52] This is what the learned judge said:

(a) The plaintiff's version of the whole episode regarding the relationship between the parties is more probable in the light of the whole circumstances of the case. Besides, the evidence of the plaintiff is also corroborated by PW2 who testified that he was employed by the plaintiff to construct culverts and digging holes to plant oil palm seedlings at the defendant's estate between the months of June, July and August 1999. PW2 also testified that he used to see Tan Tuan Kim who was supervising the plaintiff's work in the estate.

(b) I also find the evidence of PW1 in respect of his meeting with DW1 in the estate during one of DW1's fishing trips to the estate and asking DW1 about the status of the agreement promised of him by the said Tan Tuan Kim to be credible. DW1 himself confirmed about this chance meeting and again, the plaintiff's solicitors' letter of demand written to the defendant way back in November 2002 (D15) also lends support to this fact.

[53] In arriving at his findings, the learned judge invoked s 114(g) of the Evidence Act 1950. This is what the learned judge said:

> I am satisfied that the plaintiff has discharged its burden of proof on the balance of probabilities. The onus now is on the defendant to prove that the said Tan Tuan Kim possessed no such power or authority. The evidence of Tan Tuan Kim is certainly the best evidence which the court is entitled to. His evidence is all the more important to enlighten the court on exhs D18 and D19 which were all purportedly issued and paid by the company upon his requisition while managing the estate. His evidence can also disprove the plaintiff's claim as to the representations and promise he made on behalf of the company. Since his evidence is not forthcoming, it would under the circumstances of the case be appropriate for this court to draw an adverse inference under s 114(g) of the Evidence Ac t for the failure of the defendant to call him to testify.

[54] Section 114(g) of the Evidence Act provides:

> 114 Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[55] In my judgment, having examined the entire evidence of the parties, the learned High Court judge was correct in his ruling that there was an oral contract formed between the plaintiff (through Suburamaniam) and the defendant (through Tan). The learned judge has had the opportunity of observing the demeanour of the witnesses, and he found Suburamaniam to be a credible witness, and he gives his reasons for his findings. Having examined the reasons given by the learned judge, I, as an appellate judge, should not disturb his findings. I do not think that his findings are against the weight of evidence or in anyway perverse. In the recent case of *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari Noh bin Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 the Federal Court again reminded appellate courts that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour; and therefore unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge.

[56] In my view, in the present case, the learned judge is correct in his finding that the evidence of Suburamaniam was corroborated by one Suburamaniam

a/l Samikannu (PW2). PW2 was a contractor engaged by Suburamaniam to do earth moving works in the defendant's estate when Suburamaniam started his works there after the oral agreement with Tan.

[57] The learned judge also appropriately made a finding that the documentary evidence, particularly, exhs P2A–F, P7, P8A–B and P9A–C, tendered by Suburamaniam at the trial lends credence to his evidence that he had expended money to buy those things that he had claimed to have purchased for the purpose of carrying out the works under the oral contract.

[58] In my opinion, the learned trial judge was correct in invoking the presumption under s 114(g) of the Evidence Act 1950 by reason of the failure of the defendant to call Tan, a director of the defendant at the material time, to give evidence. There is no explanation at all in the evidence of the defendant as to why Tan was not called to testify. Clearly Tan is a material witness for the defendant. Indeed, Tan's evidence is crucial to the defendant. For Tan is the very person that Suburamaniam claimed to have made the oral agreement with. Yet, for reasons best known to the defendant, Tan was not called. To my mind, this failure on the part of the defendant to call Tan is tantamount to the withholding of evidence. The presumption under s 114(g) that ought to be made here is that, had Tan been called by the defendant, his evidence would have been unfavourable to the defendant (see *Tay Tong Chew & Anor v Abu Rahman bin Hj Ahmad* [1984] 1 CLJ 389 (Rep); *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; [1988] 1 CLJ 50 (Rep); and *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ 155 (Rep)). Now, this issue of the learned judge invoking the presumption under s 114(g) is raised by the appellant in one of the grounds of appeal in its memorandum of appeal; however, remarkably, this issue does not appear to have been addressed by the appellant's learned counsel in his written submission.

[59] The main witness for the defence is Cheong Pang Kwan (DW1) the executive director of the defendant. He said that the defendant never employed Suburamaniam to do the works as claimed by the latter. He said that his company had engaged other contractors to carry out the replanting works, and that they were Ng Boon Geok and Tan Leng Siong. But these two persons were never called as witnesses for the defence; and, as I have pointed out a moment ago, neither was Tan Tuan Kim ('Tan'), the defendant's own director called. And when DW1 was crossed-examined about the alleged oral agreement between Tan and Suburamaniam, bearing in mind that DW1 was the executive director of the defendant company, his answers were arrogant, irresponsible and evasive. I shall illustrate by referring to the following evidence given by DW1 during cross-examination:

Q: You also said in your answer that one of the plaintiffs…Is it Mr. Suburamaniam who is making the claims here?

A: That's right.

Q: Was he one of the persons who were there?

A: I believe he is.

Q: What did he ask you?

A: He started on some estate work that he purportedly has done. But I told him I don't know who you are and I have not given any contract work to you.

Q: And then what was his reaction? How did he react to your answer?

A: I can't recall because I did not want to keep on at it because it was … I had guest there and we were having rest and recreation at the point of time.

Q: Was Mr. Tan Tuan Kim another director around that place during/around the time?

A: I can't recall whether at that point in time he was around.

Q: Did you check with him what is this Indian man coming and asking about … why didn't you ask?

A: Why should I?

Q: It is your estate, you are fishing, somebody is coming confronting you with a contract works and you are the executive director. You just couldn't be bothered about it? Is it?

A: I know that I had not employed any person such a person to do any of my contracting work.

Q: Did you ask Mr. Tan Tuan Kim about this Indian man coming and asking you what is happening to my contract? Did you ask him?

A: I can't recall.

[60] Apart from DW1, the defendant also called another director of the defendant company, Siew Kum Kooi (DW2), to be its witness. DW2 had been a director of the defendant since 1995. DW2 was responsible for the general administration of the defendant company. He looked after the accounts of the company and kept track of payments made to the creditors of the company. He was in charge of files in which the company's vouchers and invoices were kept. He also prepared the monthly summary of payments made by the company in respect of estates owned by the defendant. He said that in 1999 replanting and manuring works in the estate were done by two contractors, namely, Tan Leng Siong and Ng Boon Geok. He said road works and culverts were also done by the same two contractors. He said no vouchers were ever issued in the name of Syarikat S F.

[61] In my judgment, the learned High Court judge was right in not giving much weight to the evidence of DW2 or to the documentary evidence adduced by him. Firstly, there is no evidence that DW2 ever visited the estate. Indeed, he

had never met Suburamaniam. He also had never met either Tan Leng Siong or Ng Boon Geok, who the defendant claims to be its contractors. He was in no position to confirm that Tan Leng Siong and Ng Boon Geok were contractors of the defendant; or that these two persons in fact did exist. He just relied on the information provided to him by Tan. He personally had never made any payment either to Tan Leng Siong or to Ng Boon Geok. He had never issued any vouchers authorising payments to either Tan Leng Siong or Ng Boon Geok. All he did was simply to give empty vouchers and cash to Tan to effect payments (supposedly) to Tan Leng Siong and Ng Boon Geok. Tan would fill in the vouchers and would get the contractors in question to sign the vouchers; and he would then forward the signed vouchers to DW2. DW2 in cross-examination appears to have impliedly admitted that there were irregularities in his handling of the financial matters of the company with regard monies handed to Tan for payments (supposedly) to contractors. Since Tan, Tan Leng Siong and Ng Boon Geok were never called as witnesses by the defendant to explain exactly what role they played, and whether they ever received the monies allegedly paid out by DW2, the evidence (including the documentary evidence) adduced by the DW2 is hardly of any probative value.

[62] The appellant in its memorandum of appeal contends that as a matter of law any representation made by Tan to Suburamaniam was incapable of binding the defendant company. However, before this court this issue again was not raised in the written submission of learned counsel for the appellant. Be that as it may, the learned High Court judge addressed this issue in his grounds of judgment. It is as follows:

> In the circumstances of the case, it is logical and reasonable for the plaintiff to rely on the representation and promise of Tan Tuan Kim. Any reasonable man would assume that a man in that position and function would have the authority and power to act on behalf of the company. Tan Tuan Kim represents the company. It is not the business of the plaintiff and PW1 has no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with. Outsiders dealing with the company in good faith are entitled to assume that acts within the company's constitution and powers have been properly performed. And are not bound to inquire whether acts of internal management have been regular. A corporation like the defendant is an abstraction. It has no mind of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent. That person maybe the board of directors itself or may be someone that has an authority to coordinate with the board of directors (see *Pekan Nenas Industries Sdn Bhd v Chang Chin Chuen* [1998] 1 MLJ 465; *Leonard Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705; and *Royal British Bank v Turquand* (1856) 119 ER 886). Tan Tuan Kim was such a person.
>
> (f) Whether a director or a person is authorised either expressly or impliedly to make representation on the company's behalf depends very much on the facts

and circumstances of the case. It also depends on the authority of the said person to make that representation. For such representation to be binding on the company, it must be established that the director and in this case the said Tan Tuan Kim, had the authority to enter on behalf of the company into a contract of the kind sought to be enforced. Secondly such representation was made by a person who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates. Thirdly, the contractor, in this case the plaintiff, was induced by such representation to enter into the contract and fourthly, the memorandum or articles of association of the defendant company gives the company the capacity either to enter into a contract of that kind sought to be enforced or to delegate authority to enter into a contract of that kind to the said Mr Tan Tuan Kim (see *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480; Chan & Koh on *Malaysia Company Law, Principles & Practice* (2nd Ed) at p 152).

I find all these four features are present as to hold that the representation and promise made by the said Tan Tuan Kim to the plaintiff will bind the company. The company is aware of the powers and acts of Tan Tuan Kim as the manager of the estate. DW2 in his evidence says, all the payments made through the vouchers are based on requisitions made by Tan Tuan Kim. Everything in the running of the estate was left solely in the care and management of the said Tan Tuan Kim. By so permitting the said Mr Tan Tuan Kim to act in that manner in the conduct of its principal business with the plaintiff, the company represents to the world that Tan Tuan Kim had the authority.

[63] To put it briefly, the learned judge takes the view that, considering the position of Tan in the defendant company (a director) and the role he played in the management of the estate, the oral contract that Tan made with the plaintiff, in his capacity as a director of the defendant company, as a matter of law, binds the defendant company. In my judgment, this view of the learned judge, on the facts of the case, is correct in principle. The rule in *Turquand*'s case protects outsiders dealing with a company in good faith who are entitled to assume that acts within the constitution and powers of the company have been properly performed, and are not bound to inquire whether acts of internal management have been regular. In the present case, the outsider is Suburamaniam, and he had been dealing with Tan, as a director of the defendant company, in good faith.

[64] In his written submission, the learned counsel for the appellant refers to the following evidence of Suburamaniam given during cross-examination:

Q: *I put it to you that you didn't have any contractual arrangement with Sang Lee.*

A: I don't have any agreement with them.

Q: *I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. You agree?*

A: Agree.

[65] Having referred to the above evidence, learned counsel submits that the above evidence shows that Suburamaniam took instructions and worked for other contractors, and hence there was no oral contract between the plaintiff and the defendant.

[66] With respect, at the outset, I have to point out that the above presentation of the evidence of Suburamaniam by leaned counsel for the appellant is misleading. Firstly, the second question put to Suburamaniam did not immediately follow the first question put tohim. There was in fact another question put to Suburamaniam in between the above two questions, which has been omitted by the learned counsel. The question in between is this:

Q: *You don't have any arrangement with Sang Lee not whether written or not you don't have any contractual dealings with Sang Lee.*

A: I don't agree.

[67] Secondly, in order to assess fairly the evidence of Suburamaniam, we must not be selective on the evidence. We must view his evidence in the proper perspective and this means that we have to consider the other evidence of Suburamaniam. In other words, we have to examine his evidence in a wider context. Actually, what Suburamaniam said in cross-examination is this:

Q: *I put it to you that you didn't have any contractual arrangement with Sang Lee*.

A: I don't have any agreement with them.

Q: *You don't have any arrangement with Sang Lee not whether written or not you don't have any contractual dealings with Sang Lee*.

A: I don't agree.

Q: *I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. You agree?*

A: Agree.

Q: *I put it to you further that Mr. Ah Seng was one of those contractors. You agree?*

A: I don't agree.

Q: *I put it to you when you first met Cheong Phang Kwan fishing at the Sang Lee estate you first met him, he made it clear to you that Sang Lee had no dealings with you. You agree?*

A: I agree.

Q: *I refer you to last question 20. I put it to you that the Sang Lee never appointed you as their contractor for the replanting of oil palm exercise.*

A: I don't agree.

Therefore, when Suburamaniam said in cross-examination that —

A: I don't have any agreement with them.

[68] He cannot be taken to have meant that he did not have any agreement at all with the defendant. What he meant is that he did not have any written agreement with the defendant, and this is a fact. If Suburamaniam's evidence is examined in its proper perspective, one could easily appreciate that he was throughout consistent in his stand: that there was indeed an oral agreement between him (on behalf of the plaintiff) and Tan (on behalf of the defendant). With respect, I fail to see the logic of the defendant's reasoning that just because Suburamaniam admitted taking instructions from contractors appointed by the defendant, therefore, it must follow that there could not have been an oral contract between him and Tan; or that he had lied about the existence of the oral agreement between him and Tan. In the first place, considering that Suburamaniam had made a direct allegation and had given direct evidence that the person with whom he had made the oral agreement was Tan, I must say that I am unable to understand as to why the defendant has to take an indirect approach in its endeavour to prove the non-existence of the oral contract between Suburamaniam and Tan by adducing evidence about the existence of 'other contractors' in the estate appointed to do replanting works, when the defendant could have easily adduced direct evidence of the non-existence of the oral contract between Suburamaniam and Tan simply by just calling Tan, the defendant's own director. And this brings us back to the perplexing question: why was Tan not called as a witness by the defendant?

[69] Finally, there is the argument raised by the appellant that the terms of the alleged oral agreement between Suburamaniam and Tan are vague and therefore are incapable of constituting a valid contract, citing s 30 of the Contracts Act 1950. Although this is an issue that does not appear to have been raised in the memorandum of appeal, nonetheless, I shall deal with it. With respect, in my judgment, based on the evidence of Suburamaniam, the terms of the oral agreement between Suburamaniam and Tan, are quite clear, and are capable of constituting a valid contract under the Contracts Act 1950. The obligations on the part of the plaintiff are as follows: (1) to plant oil palms on 240 acres of the estate; (2) to replant oil palms that had been destroyed by wild boars in the other 240 acres of the estate; (3) to carry out maintenance works (including weeding and manuring) on the oil palms in the entire 480 acres of the estate; (4) to bear the expenses incurred for the aforesaid works; (5) and to surrender the oil palm trees to the defendant after ten years; (6) to carry out the works immediately. The obligations on the part of the defendant are (1) to give the plaintiff the right to harvest the fruits of the oil palms of the entire 480 acres of the estate for a period of ten years, in return for the services rendered by the plaintiff to the defendant; and to prepare a written agreement as soon as possible.

[70] Appeal dismissed with costs; the order of the High Court affirmed. **A**

Appeal allowed with costs.

Reported by Kohila Nesan **B**

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